84-1611

Office - Supreme Court, U.S.
FILED
APR 5 1985
ALEXANDER L. STEVAS,
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1985

FREDERICK LANCASTER,

Petitioner

vs.

PEOPLE OF THE STATE OF
ILLINOIS

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DENNIS M. DOHERTY
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312/580-0935

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Counsel for Petitioner

25 pp

(a)

QUESTION PRESENTED FOR REVIEW

I.

Whether ineffective assistance of counsel at sentencing is a constitutional deprivation cognizable in post-conviction proceedings, where defendant's due process right to be sentenced on the basis of erroneous information was violated.

(b)

LIST OF PARTIES IN THE COURT BELOW

Frederick Lancaster, petitioner, was represented by attorney Dennis M. Doherty.

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The People of the State of Illinois were represented by the State's Attorney of Cook County.

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(c)

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(d)

REFERENCES TO REPORTS OF OPINIONS

The Order of the Appellate Court of Illinois disposing of appeal under Illinois Supreme Court Rule 23 is not reported. A copy of the order is attached at App. A. A copy of the order denying petition for rehearing is at App. B.

The order of the Supreme Court of Illinois denying leave to appeal is not reported. It is attached at App. C.

(e)

STATEMENT OF JURISDICTIONAL GROUNDS

(i) The order and judgment of the Appellate Court was entered on May 30, 1984. A timely petition for rehearing was denied on October 9, 1984.

(ii) A timely petition for leave to appeal was denied by the Supreme Court of Illinois on February 5, 1985.

(iii) (does not apply)

(iv) Jurisdiction of this court is invoked under Title 28, U.S.C. §1257(e).

(f)

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Fourteenth Amendment:

> ". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATUTES INVOLVED

Where applicable, they are set out in the body of this petition.

(g)

STATEMENT OF THE CASE

In 1972, petitioner pleaded guilty to murder and was sentenced to 20-40 years. No direct

appeal was taken. In 1982, petitioner filed a petition for Post-Conviction relief, supplemented by affidavits. Petitioner asserted that his sentence had been imposed in violation of his due process rights to effective assistance of counsel, and not to be sentenced on the basis of erroneous information. The State moved to dismiss, and submitted trial counsel's affidavit wherein counsel averred no recollection whether petitioner had told him of his physical condition (terminal kidney disease) prior to sentencing. The trial court granted the State's motion to dismiss, striking and dismissing the petition without an evidentiary hearing.

Petitioner alleged - and his trial counsel did not deny - that before sentencing in 1972, petitioner had told his lawyer that he had been discharged from the Marine Corps following a serious illness diagnosed by federal government physicians as terminal kidney disease, and that the trial

judge was (concededly) unaware of his physicial condition at the time of sentencing. There was verified documentation (in a letter from petitioner's State-employed treating physician) that petitioner's kidney disease was diagnosed by government physicians at Camp Pendleton. (R. 85)

(h)

RAISING THE FEDERAL QUESTIONS

The questions presented for review in this Court were presented below. The issues were addressed by the appellate court. (App. A & B) The Supreme Court of Illinois denied leave to appeal. (App. C)

(i)

REASONS FOR GRANTING THE WRIT

Ineffective assistance of counsel at sentencing is a constitutional deprivation cognizable in post-conviction proceedings. A defendant in a

criminal case has a federal and state constitutional right to counsel at all critical stages of the proceedings, including at sentencing. Mempa v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948) A claim of ineffective assistance of counsel is a claim cognizable in proceedings under the Illinois Post-Conviction Hearing Act, Illinois Revised Statutes, Chapter 38, par. 122-1, et seq. People v. Pannell, 44 Ill.App.3d 885, 358 N.E.2d 1331 (3 Dist. 1977)

The court below misapprehended petitioner's claim as raising no more than excessiveness of sentence. In its order, the appellate court stated that "alleged excessiveness of sentence is not cognizable in post-conviction proceedings." (App. A, p. 3) Petitioner's claim was based on incompetency of counsel. An allegation of incompentency of counsel has long been deemed cognizable in post-conviction proceedings, and is of

constitutional magnitude. Inasmuch as the Appellate Court operated under the mistaken belief that petitioner's claim was not "cognizable" in post-conviction proceedings, the judgment of the appellate court is in error. Extending the appellate court's reasoning in this regard, no petitioner will ever be able to raise ineffective assistance of counsel at sentencing in a post-conviction petition, as it will always be rejected as an effort to assert excessiveness of sentence. Due process violations with respect to sentencing, and ineffective assistance of counsel at sentencing, raise more than "excessiveness of sentence."

The Appellate Court erroneously implied that effective assistance of counsel at sentencing is not of constitutional magnitude. In its judgment, the appellate court stated that "the fact that a sentencing hearing might not have contained sufficient evidence upon which the court could have exercised its sentencing discretion, does not pose

a question of constitutional proportion." (App. "A", p. 3) An attorney who possesses crucial evidence in mitigation, yet who fails to present such evidence to the sentencing court, does not commit malfeasance of non-constitutional magnitude. The decisions of this Court in Mempa v. Rhay, 389 U.S .128 (1967), and Townsend v. Burke, 334 U.S. 7356 (1948), make this very clear.

There is a due process right not to be sentenced on the basis of erroneous information. This is a federally-recognized due process right. Townsend v. Burke 334 U.S. 736 (1948); United States v. Tucker, 404 U.S. 443 (1972); United States v. Harris, 558 .F2d 366 (7 Cir. 1977)

In its judgment, the appellate court concluded that "the record does not show that the trial court would have imposed a lesser sentence." (App. "A", p. 3) Petitioner submits that this conclusion overlooks the comment by the trial court when

apprised of petitioner's allegations:

> I don't see anything good having been done in that sense; he at least could have been given a minimum .... (R. 15)

More significantly, however, whether or not the trial court would have imposed a lesser sentence should not be determined by the guesswork of the appellate court. The factual allegations, undenied by the State's Motion to Dismiss, require an evidentiary hearing. People v. Reeves, 412 Ill. 555, 107 N.E.2d 861 (1952) In the case at bar, petitioner's allegations that at the time of sentencing he suffered from a terminal medical condition, already diagnosed as such by government doctors, not known by the sentencing court, but known by petitioner's attorney, are just such extra-record allegations as require that an evidentiary hearing be held. The "right to be heard before being condemned to suffer grievous loss of any kind ... is a principle basic to our society." Wisconsin v. Constantineau, 400 U.S. 433, 437

(1971)

Petitioner was prejudiced by the due process violation at sentencing. As the sentencing court noted when apprised of petitioner's contentions:

> [H]ad the Court known he had a limited time to live ... he at least could have been given a minimum, [under] which he would have been out by now. (R. 15)

This commentary by the sentencing court demonstrates the prejudice to petitioner of his counsel's failure to communicate the actual facts regarding petitioner's medical condition to the court. Accord, see Osborne v. Commonwealth, 389 N.E.2d 891 (Mass. 1979), remanding for resentencing for murder some 10 years after defendant pleaded guilty, where defendant alleged that he was deprived of effective assistance of counsel, since counsel failed to bring various mitigating factors to the judge's attention -- such as his

service record in Vietnam -- mentioning only defendant's alcohol problem. Id., at 987-8.

In the case at bar, counsel merely asked for mercy, making no argument at all in mitigation. (R. 213) This inaction amounts to ineffective assistance, considering petitioner's uncontradicted and verified assertions that he told his counsel of his terminal physical condition. Where counsel does "nothing" at sentencing that amounts to ineffective assistance. Young v. Zant, 560 F. Supp. 274, 280 (M.D. Ga. 1980) Had the crucial information concerning petitioner's physical debility been communicated to the court, defendant could have been sentenced to a minimum of 14 years to 14 and a day rather than the 20 to 40 year sentence he received. Under these circumstances, petitioner was prejudiced by the due process violation at sentencing.

The trial court's summary disposition of this cause without an evidentiary hearing - where peti-

tioner's allegations were undenied, even by his trial cousnel -- was error. The appellate court's summary disposition of the constitutional issues involved was error. The judgment below should be reversed and this cause should be remanded for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, petitioner Frederick Lancaster prays that a writ of certiorari issue to review the judgment of the court below.

Respectfully submitted,

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App. A

Third Divison
May 30, 1984

82 - 2019

IN THE APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
vs.	)	Cook County.
FREDERICK LANCASTER,	)	Honorable Daniel J. Ryan,
Defendant-Appellant.	)	Judge Presiding

ORDER DISPOSING OF APPEAL

UNDER SUPREME COURT RULE 23

In 1972 defendant entered a negotiated guilty plea to murder based on his fatal shooting of a Chicago police officer who came upon defendant while the latter was committing a felony. In accord with the terms of the plea agreement,

82-2019

defendant was sentenced to an indeterminate term of 20 to 40 years. No direct appeal was taken. In 1982 defendant sought post-conviction relief and his release. The trial court denied relief without an evidentiary hearing. Defendant now contests the correctness of this ruling and seeks an evidenitary hearing on his petition.

The record shows less than one year before the slaying defendant, who was then in the military, was diagnosed as having a kidney ailment which would lead to kidney failure and ultimately cause his death. After his conviction he began dialysis treatments in 1974. In 1975 and 1978 he underwent unsuccessful kidney transplant operations, and now he is no longer considered a candidate for such procedure. Currently, defendant is taken from the penitentiary three times each week to a Chicago medical facility to receive dialysis treatments which last several hours.

82-2019

When defendant became eligible for parole, his request was denied. After he then unsuccessfully attempted to gain executive clemency from the governor, he filed his post-conviction petition.

In support of his petition defendant appended his own affidavit in which he asserted that he had told his counsel of his kidney condition before the guilty plea and the affidavit of that counsel that he had no recollection of being advised of defendant's kidney ailment. Defendant asserted that, if the court had been advised of his condition, perhaps a different sentence would have been given which could have already resulted in his release.

Defendant now maintains that his retained counsel at the plea hearing failed to advise the court of his critical physicial condition and such inadvertence deprived him of due process to the effective assistance of counsel. He characterizes

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his allegations as making out at least a colorable claim of a constitutional violation.

To prevail on a claim of incompetency of counsel, a defendant must show actual incompetence which materially affected the outcome of trial. (People v. Royse (1983), 99 Ill.2d 163, 168, 457 N.E.2d 1217.) Specifically, defendant argues that he had a right to have his sentence based on accurate information; that his allegations now raise questions of his counsel's competence for failure to transmit information of his medical condition to the trial court which might have affected his sentence; and that such allegations require an evidentiary hearing.

Based on Royse standard, we conclude that the trial court acted correctly in dismissing defendant's petition without an evidentiary hearing. An alleged excessiveness of sentence is not congnizable in post-conviction proceedings. (People v.

82-2019

Ballinger (1973), 53 Ill.2d 388, 390, 292 N.E.2d 400.) Further, generally the fact that a sentencing hearing might not have contained sufficient evidence upon which the court could have exercised its sentencing discretion does not pose a question of constitutional proportion. (People v. Wilbourn (1971), 48 Ill.2d 187, 190, 268 N.E.2d 148.) And, even if a possible point of constitutional import was not presented to the sentencing judge, there must be a reasonable probability that the sentence would have been less if that point had been made known. People v. Placek (1976), 43 Ill.App.3d 818, 822, 357 N.E.2d 660.

In the present case the post-conviction matter was considered by the same judge who had accepted defendant's negotiated plea a decade before. The court recalled that it had concurred on the agreed-upon sentence. Despite defendant's suggestion to the contrary, the record does not

show that the trial court would have imposed a lesser sentence. Further, this is not a case where the State or defense counsel withheld material information from the sentencing judge. At the time of sentencing defendant's kidneys apparently had not yet ceased functioning, and defendant has not established that at the time of sentencing his kidney failure was imminent. In fact, defendant was discharged by the military less than one year before he fatally shot the officer. At this point he knew of his kidney ailment, yet the record does not show that at that time dialysis was required. Rather it appears that this medical procedure was not necessary until two years after his guilty plea. Thus we do not see any basis upon which defendant's sentence might have been affected because the trial was not apprised at that time of sentence or defendant's condition. Finally, we would add that given the

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nature of defendant's offense, the negotiated sentence cannot be said to have been severe. Defendant simply did not present any matters requiring an evidentiary hearing.

Accordingly, the judgment of the circuit court is affirmed.

McNAMARA, McGILLICUDDY and WHITE, JJ.

Order

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee,	)	
vs.	)	No. 82 - 2019
FREDERICK LANCASTER, Petitioner-Appellant.	)	

ORDER

Upon consideration of the petition for rehearing filed on September 17, 1984, by petitioner-appellant, said petition is hereby DENIED.

Enter:

Order Entered Oct 09, 1984

_____
Justice

_____
Justice

App. C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035
February 5, 1985

Mr. Dennis M. Doherty
Attorney at Law
35 E. Wacker Dr., #3500
Chicago, IL 60601

No. 61033 - People State of Illinois, respondent,
v. Frederick Lancaster, petitioner.
Leave to appeal, Appellate Court,
First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this court will issue to the Appellat Court on February 26, 1985.

No. 84-1611

Office-Supreme Court, U.S.
FILED
MAY 30 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FREDERICK LANCASTER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether states must afford a post-conviction hearing for insubstantial constitutional claims.

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Statutes:

Ill. Rev. Stat. 1983, ch. 38, § 122-1 *et seq.* .... *passim*

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No. 84-1611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FREDERICK LANCASTER,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The respondent asks this Court to deny the petition for writ of certiorari to review the judgment and order of the Appellate Court of Illinois for the First Judicial District insofar as the petitioner's issue does not raise a question of constitutional proportion worthy of review by this Court.

OPINION BELOW

The petitioner seeks review from an Illinois Appellate Court, First District, opinion in *People v. Lancaster*, No. 82-2019 (1st Dist., 1984). A copy of the opinion is included with petitioner's petition. The petitioner's petition for leave to appeal to the Illinois Supreme Court was denied on February 5, 1985.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition. As treated more fully in the argument contained herein, however, petitioner has not shown grounds for this Court to exercise its sound discretion to grant his Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ill. Rev. Stat. 1983, ch. 38, § 122-1:

> Petition in the trial court. Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by

affidavit. Petitioner shall also serve another copy upon the State's Attorney by any of the methods provided in Rule 7 of the Supreme Court. The clerk shall docket the petition for consideration by the court pursuant to Section 122-2.1 upon his receipt thereof and bring the same promptly to the attention of the court. No proceedings under this Article shall be commenced more than 10 years after rendition of final judgment, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

U.S. Const. amend. V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF FACTS

In 1972 petitioner entered a negotiated guilty plea to murder based on his fatal shooting of a Chicago police officer who came upon petitioner while the latter was committing a felony. In accord with the terms of the plea agreement, defendant was sentenced to an indeterminate term of 20 to 40 years.

Ten years later, after unsuccessfully seeking executive clemency, petitioner sought collateral relief pursuant to the Illinois Post-Conviction Hearing Act, *Ill. Rev. Stat.*

1983, ch. 38, § 122-1 *et seq.* Petitioner alleged as his basis for relief that prior to entering his guilty plea, he had told his attorney that he was suffering from a serious kidney ailment. Because his attorney failed to advise the court of his condition, petitioner contended, he was deprived of the possibility of winning a more lenient sentence. Petitioner's trial counsel submitted an affidavit stating he had no recollection whether petitioner had in fact told him about the kidney ailment. The trial court denied defendant's petition without an evidentiary hearing.

On review, the Illinois Appellate Court for the First Judicial District ruled, *inter alia*, that petitioner's ineffectiveness of counsel claim was properly dismissed because 1) the fact that the sentencing hearing might not have contained exhaustive evidence upon which the court could have exercised its sentencing discretion did not pose a question of constitutional proportion; and 2) there was not a reasonable probability that the sentence would have been less if petitioner's condition had been known, especially in light of the grievous nature of his offense. In fact, the Illinois appellate court characterized the information regarding petitioner's physical condition as non-material. Petitioner apparently rested his allegation that he might have received a lesser sentence on the circumstance that he now must travel three times a week to a Chicago medical facility for dialysis treatments. Yet at the time of his sentencing, petitioner's kidneys were still functional; dialysis was not required until two years after the guilty plea. The appellate court, therefore, affirmed the trial court's ruling that petitioner's claim did not merit an evidentiary hearing, since there was no basis upon which petitioner's sentence might have been affected by the fact that the trial court was not apprised of petitioner's condition.

The Illinois Supreme Court denied petitioner's petition for leave to appeal.

REASON FOR DENYING THE WRIT

STATES ENJOY THE RIGHT TO SHAPE THE SCOPE OF REVIEW IN ANY COLLATERAL PROCEEDINGS THEY DEVISE AS LONG AS EQUAL PROTECTION AND DUE PROCESS PRINCIPLES ARE NOT VIOLATED.

No warrantable concerns compel this Court to exercise its discretionary jurisdiction to review the decision below. The constitutionality of trial courts' exercise of discretion pursuant to the Illinois Post-Conviction Hearing Act, *Ill. Rev. Stat.* 1983, ch. 38, § 122-1 *et seq.* ("Act") was correctly decided by the Appellate Court of Illinois and does not present the kind of novel or pressing issue worthy of review by this Court.

Petitioner asserts that a claim of ineffectiveness of counsel at sentencing should be cognizable in a post-conviction proceeding. Petitioner's assertion is governed by the principle that states are free to shape the scope of their collateral proceedings, and hence, are free to determine what kind of claims are substantial enough to warrant collateral review.

The United States Supreme Court ruled that appellate review is not a necessary element of the Fourteenth Amendment's due process clause in the seminal case *McKane v. Durston*, 153 U.S. 684, 915 (1894). In *McKane*, the court observed that states are accorded total discretion in affording review of final judgment in criminal cases, and that states may structure the terms of that review as they deem proper. *Id.* More recently, this principle was reaffirmed in *Griffin v. People of the State of Illinois*, 351 U.S. 12, 18 (1956), wherein the Court noted that although the Constitution does not mandate appellate review on the state level, once provided, that review can

be freely shaped or delimited so long as equal protection and due process principles are not offended. 351 U.S. at 21 (Frankfurter, J., concurring). *See also Jones v. Barnes*, ____ U.S. ____, 103 S.Ct. 3308, 3312 (1983) (no constitutional right to an appeal); *United States v. MacCollom*, 426 U.S. 317, 323 (1976) (due process clause of Fifth Amendment establishes no right to collateral attack of final judgment). These cases clearly establish that petitioner had no inherent liberty or property interest in obtaining post-conviction review.

The Illinois Act provides, in pertinent part, that an imprisoned individual who asserts the "substantial denial" of his rights in the proceedings that resulted in his conviction may institute a proceeding under the Act. *Ill. Rev. Stat.* 1983, ch. 38, § 122-1. *People v. Logan*, 39 Ill. App. 3d 656, 657, 350 N.E.2d 40, 41 (4th Dist. 1976) (relief granted under post-conviction act only for substantial constitutional error). If the post-conviction court determines the claim is patently without merit, however, the petition is dismissed. *Ill. Rev. Stat.* 1983, ch. 38, § 122-2.1(a).

Respondent does not quarrel with petitioner's assertion that he has the right to effective assistance of counsel at the sentencing stage of his trial. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). In accordance with the aforestated constitutional principles, however, the State of Illinois has the absolute right to dismiss without a hearing claims of ineffectiveness of counsel that are patently insubstantial.[1]

[1] While petitioner relies entirely on his meritless due process claim, respondent notes that he cannot raise a viable equal protection challenge either. Equal protection violations in the context of collateral proceedings generally refer not to substantive limits on the scope of review, but rather, to the structuring of collateral proceedings such that defendants are effectively denied equal access to review. *See Evitts v. Lucey*, ____ U.S. ____, 105 S.Ct. 830,

(Footnote continued on following page)

Petitioner's claim, measured against the standard set out in *Strickland v. Washington*, ____ U.S. ____, 104 S.Ct. 2052, 2064 (1984), is clearly insubstantial. Petitioner's claim would not have established either the deficiency or the prejudice prong of the *Strickland* test, given the Illinois appellate court's finding that petitioner's physical state at the time of sentencing would not have effectuated a reduction in his sentence. Illinois law comports with the *Strickland* standard which calls for a showing of reasonable probability that but for the cited error, the result of the proceeding would have been different. *Strickland*, 104 S.Ct. at 2068; *accord People v. Placek*, 43 Ill. App. 3d 818, 822, 357 N.E.2d 660, 663-664 (2d Dist. 1976) (requires showing that sentence would have been less). Moreover, the post-conviction court did not categorically refuse to entertain petitioner's claim, as he suggests. Rather, the court entertained the claim and then dismissed it as unworthy of further review.

Regardless, Illinois has the right to limit the scope of cognizable ineffectiveness of counsel claims to substantial constitutional questions or even to forego affording collateral review altogether. *Griffin, supra* at 5-6. *See also Kelsey v. Fitzgerald*, 574 F.2d 443 (8th Cir. 1978) (no right to post-conviction remedy). The trial court's dismissal in the case at bar and the substantiality policy are especially rational in light of the inordinate number of ineffectiveness claims that are filed in post-conviction proceedings. *Gray v. United States*, 299 F.2d 467, 468 (D.C. Cir. 1962); *see*

---

[1] *continued*
841 (1985). Such violations include failure to provide transcripts to indigents, *Griffin*, 351 U.S. at 17-18; and denial of benefit of counsel to indigents on appeal. *Douglas v. People of State of California*, 372 U.S. 353, 356 (1963). Equal protection certainly does not require that a state cannot, as Illinois does, differentiate between substantial and insubstantial claims.

generally L. Yackle, *Post Conviction Remedies* § 64 (1981 & Supp. 1985). Furthermore, undue encouragement of insubstantial ineffectiveness claims runs counter to the Sixth Amendment notion of opposing, independent adversaries undiluted by endless judicial review. Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. Chi. L. Rev. 1380, 1408 (1983).

In any event, the state need not justify its decision to shape its scope of collateral review the way it has. *Griffin*, 351 U.S. at 18. The decision below was, therefore, decided correctly and in accord with prevailing constitutional principles. Petitioner's claim is thus unworthy of review by this Court and his petition should be denied.

CONCLUSION

For the foregoing reasons, the respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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